IN THE

# Supreme Court of the United States

October Term, 1949.

No. 31. 31

LOUIS A. REILLY, as Postmaster of the City of Newark, in the County of Essex and State of New Jersey,

*Petitioner,*

*v.*

JOSEPH J. PINKUS, Trading as American Health Aids Company, Also Known as Energy Food Center,

*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

## BRIEF FOR RESPONDENT.

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## BRIEF FOR RESPONDENT.

### OPINIONS BELOW.

The opinion of the United States District Court for the District of New Jersey, (R. 59-62) is reported at 71 F. Supp. 993. The opinion of the United States Court of Appeals for the Third Circuit (R. 68-74) is reported at 170 F. (2d) 786.

### JURISDICTION.

The judgment of the Court of Appeals was entered October 25, 1948 (R. 76). The Petition for a Writ of Certiorari was filed February 21, 1949, and was granted May 16, 1949 (R. H 228). The jurisdiction of this Court was invoked under Title 28, United States Code, Sec. 1254 (1).

## QUESTIONS PRESENTED.

Whether the court below properly held that the Postmaster General had no power to issue a fraud order based upon his opinion that a medical remedy sold by respondent was totally ineffective, where there was difference of opinion as to the effectiveness of the medical remedy.

Whether the hearing officer of the Post Office Department erred in excluding cross-examination of the Government's medical experts by reference to standard medical works where the experts based their opinions partly on text authorities, and in excluding from evidence excerpts of these standard medical works even for the limited purpose of showing the existence of a conflict of opinion as to the effectiveness of respondent's remedy.

## STATUTES INVOLVED.

The provisions of Revised Statutes, Sec. 3929, as amended, 39 U. S. C. Sec. 259 (1946), and Revised Statutes, Sec. 4041, as amended, 39 U. S. C. Sec. 732 (1946), are set forth in the appendix, *infra*, pages 57 to 58.

## STATEMENT

Since approximately 1939, respondent had been engaged in the business of operating a health food store in Newark, New Jersey, and like thousands of such stores, sold kelp to customers who asked for it (R. II 125-126).[1] He had an analysis made of kelp, and also analyzed the substance himself while taking a course in advanced organic chemistry at Montclair State Teachers College (R. II 127). At the same school, he took a course in the chemistry of foods (R. II 135). He also did experimental work in the subject at the Kirksville School of Osteopathy in Missouri (R. II 132).

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1. References to Volume II of the Transcript of the Record will be indicated by "R. II".

Respondent discussed the value of kelp in association with a recommended diet or menu with various physicians (R. II 128), and conducted a considerable amount of personal research on the relationship of kelp to obesity (R. II 129-130).

Respondent is a college graduate, and in addition, holds the degree of Master of Arts (R. II 137).

Before marketing his product in connection with a weight-reduction plan, respondent obtained letters from various doctors certifying to the effect of the product (R. II 141-142). Based on all the information and knowledge he had acquired, respondent then formulated his reducing plan. His plan consists of daily taking a half teaspoonful of Kelp-I-Dine, which is actually kelp, and cutting down on food consumption. For the latter purpose, a suggested diet is included with the package of kelp when it is sent to a customer. In addition, an unqualified money-back guarantee is extended to anyone who finds that Kelp-I-Dine does not help him lose weight (R. 16).

Before putting his product on the market, respondent sent a sample of Kelp-I-Dine to the War Production Board for classification (R. II 142). After Kelp-I-Dine was on the market, he sent the Federal Trade Commission a copy of a radio advertising script in an effort to determine the propriety of his advertising (R. II 145). Later the Food and Drug Administration suggested a small change in his label, to which he immediately agreed (R. II 145).

Since marketing his product, respondent has received thousands of letters from users of Kelp-I-Dine, a great many of whom said that their doctors had approved (R. II 152-153).

The Government placed in evidence examples of advertising inserted by respondent in various magazines, the

substance of which is summarized in a Memorandum prepared by a Solicitor of the Post Office Department for the Postmaster General (R. 16-21), and also circulars sent out in response to test inquiries, and various radio scripts which contained much the same type of statements as were contained in the advertisements (R. II 26-27, 30-35).

A chemist employed in the Food and Drug Administration testified that Kelp-I-Dine was kelp and contained four-tenths of a milligram of iodine in each half teaspoonful (R. II 36).[2]

The remaining proof submitted by the Government consisted of the testimony of two physicians, one a physician in the Municipal Hospital in Washington who was also a professor of medicine, and the other a doctor employed by the Food and Drug Administration. Neither of them had ever made any test of Kelp-I-Dine or kelp. Their testimony was based exclusively upon their general information and upon the statement as to the content of Kelp-I-Dine already placed in evidence (R. II 63-64, 99, 103, 121).

In substance, these physicians testified that kelp was valueless in the treatment of obesity, although Dr. Roberts, the first expert for the Government, did admit that iodine which is contained in kelp would have some effect on obesity in certain cases (R. II 82), whereas Dr. Norris, the Food and Drug Administration physician, while recognizing the iodine content of kelp (R. II 99), denied that it would have any reducing effect in any case (R. II 97-98). Dr. Norris admitted, however, that he had seen statements in certain medical books to the effect that kelp was used in the treatment of obesity (R. II 104, 111). The Government's medical experts also differed from each other as to

2. It is interesting to note that the respondent, upon whose alleged fraud the Government's action was based, testified, after hearing the Government chemist's testimony, that the Government's analysis was in error and that a half teaspoonful of kelp contained only three-tenths of a milligram of iodine (R. II 127, 173).

the caloric content of the diet portion of respondent's reducing plan. Dr. Roberts thought the recommended diet contained between eleven hundred and twelve hundred calories (R. II 74), whereas Dr. Norris was of the opinion that the diet would afford eight hundred or nine hundred to one thousand calories (R. II 90). The difference between these estimates is more than twenty per cent.

Both physicians agreed that by following the recommended diet contained in respondent's reducing plan, a person could lose a certain amount of weight, and possibly as much as three pounds a week or more (R. II 59, 78, 121). However, these experts testified that in certain cases such a loss of weight might be harmful,—where the person involved had one of a number of chronic diseases such as heart disease, diabetes, tuberculosis, etc. (R. II 75, 118). But it was expressly stated that kelp itself was harmless (R. II 117, 119). And Dr. Roberts testified that the recommended diet might be helpful to a patient free from disease. However, Dr. Roberts felt that **any**[3] person desiring to reduce should be observed "rather closely" by a physician (R. II 76-77).

In the course of cross-examination of Dr. Roberts, counsel for respondent attempted to read to him quotations from standard medical works regarding the use and efficacy of kelp in the treatment of obesity. The Assistant Solicitor of the Post Office Department who sat as hearing officer recognized that there were "two lines of authority" as to the permissibility of this form of cross-examination of an expert witness who has testified from general knowledge and information. However, the stricter rule, prohibiting this form of cross-examination, was followed by the courts of the state in which the assistant solicitor had practised law for 25 years, and, as he said, "I just can't get away from

3. Wherever bold face type appears in this brief the emphasis is ours.

it" (R. II 66). Accordingly, this form of cross-examination was uniformly excluded as to both of the Government's medical witnesses (R. 65-66, 105-107), even though the books themselves were identified by a Government witness as the volumes which counsel for respondent named and described and there was no question of their authenticity (R. II 108, 109, 110).

Efforts of respondent to offer these books as part of his own case met with a similar ruling (R. II 113-114), even when the statements in these books were adopted by respondent's medical witness as his own (R. II 170-173, 175, 181, 182).

The excerpts from the books which have been referred to are set forth in Volume I of the Record at pages 36 to 42. They include medical works published as recently as 1944 (the hearings having taken place in January, 1945). These works contained statements, *inter alia*, that fucus (another name for kelp) "is used . . . as a cure for obesity" (The **American Illustrated Medical Dictionary** by W. A. N. Dorland, 20th ed., Saunders, 1944, p. 588), and that it "is used . . . in obesity, under the names of antifat" (**Gould's Medical Dictionary**, edited by R. J. E. Scott, 3rd ed., Blakiston, 1931, page 533) (R. 36-38).

At the conclusion of the respondent's own testimony, counsel for respondent described the difficulty he was having in getting a medical doctor to come to Washington and testify in January, 1945,—a critical period during the war. He stated that, because of the shortage of doctors, the doctors he had hoped to present could not come to Washington to testify. These included Dr. Charles V. Craster, the Health Officer of the City of Newark, N. J., who had endorsed the product. He had tried to contact doctors in Washington, where the hearings were being conducted, and had even procured names of doctors at random from the Medical Society in Washington, but they all stated that in view of the acute shortage of doctors, they felt it unfair to

take the time necessary to analyze the product, and to prepare, and appear to testify (R. II 162-163).

He therefore requested a continuance for the purpose of presenting medical testimony. The Government's counsel objected. The assistant solicitor who was hearing the case then ruled that since the memorandum of charges was dated November 23, 1944,—six or seven weeks prior to the date of the hearing in question,—he would conclude the hearing Saturday, January 13, 1945. This ruling was made in the late afternoon of Thursday, January 11, 1945 (R. II 165).

On January 13, 1945, respondent appeared with a doctor from Newark, New Jersey, but without counsel. He stated that his attorney (since deceased) had gone to a doctor the previous day and had been ordered to bed because of a blood pressure of 260, but that he had written out questions for respondent himself to present to the medical witness (R. II 168-169). This was deemed necessary by respondent in view of the hearing officer's prior ruling that the hearings would be terminated on that day. The hearing proceeded with respondent representing himself, questioning his own witness, attempting to make objections to cross-examination, and even being faced with the necessity of answering extensive legal argument by Government counsel on the admissibility of evidence, which he, of course, did not even attempt to do (R. II 171-173).

The physician who testified on behalf of respondent was Dr. Assadour Melkon Altounian. He was educated in Syria, and was graduated from medical school there in 1906 (R. II 183). He took some postgraduate work in London (R. II 184). He had been in the general practise of medicine in this country for 24 years (R. II 169), and was an admitting physician of the City Hospital of Newark, New Jersey (R. II 169). It is obvious even from the printed transcript of his testimony that he was having considerable difficulty with the English language (see, *e. g.*, R. II 201).

In general, Dr. Altounian's testimony supported the representations made in respondent's advertising as to the effectiveness of the plan in the treatment of obesity (R. II 169-182), although he testified that a reduction of weight might be harmful in certain cases, such as where a person has heart trouble (R. II 184-185).

While respondent's medical witness stated on cross-examination (as set forth in petitioner's brief at page 11) that he based his testimony as to the loss of weight that could be achieved from following respondent's plan on a report by the Director of the Board of Health of Newark, New Jersey (R. II 207), he testified on redirect examination that after himself examining the kelp and the recommended diet in respondent's plan, he personally agreed with the aforementioned report (R. II 212).

Following the hearings, the Solicitor of the Post Office Department (not the assistant solicitor who sat as hearing officer) filed a Memorandum for the Postmaster General, dated May 3, 1945, in which he stated that kelp was valueless in the treatment of obesity and recommended issuance of a fraud order (R. 14-26). On May 7, 1945, the Postmaster General issued an order forbidding the Postmaster of Newark, New Jersey, to pay any postal money order drawn to the order of American Health Aids Company and Energy Food Center (respondent's trade names) and their officers and agents as such at Newark, New Jersey, directing him to inform the remitter of any such postal money order that payment was forbidden and that the amount would be returned on request, and instructing him to return all letters and other mail matter addressed to the above firms and persons to the senders with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly stamped on the outside of the letters (R. 12-13).[4]

4. Subsequent to the appeal from the judgment of the District Court, the fraud order was revoked by the Postmaster General insofar as it applied to the Energy Food Center and its officers and agents as such (R. 70).

On July 23, 1945, enforcement of the fraud order was preliminarily enjoined by the United States District Court for the District of New Jersey until further order of the Court (R. 51-54), principally on the ground that "there was insufficient evidence from which the Postmaster General could find actual fraud in fact on the part of the plaintiff" (R. 50).

On June 5, 1947, after the Government had filed an answer, the District Court denied the Government's motion for summary judgment (R. 62), and on June 16, 1947, entered summary judgment in favor of respondent here (R. 63-64).

On appeal, the judgment of the District Court was affirmed on October 25, 1948 (R. 68-74), with one judge dissenting (R. 74-76). The majority of the Court of Appeals for the Third Circuit based their affirmance "upon the ground that there was no substantial evidence in fact, as distinguished from opinion, to support the findings of the Postmaster General" (R. 73). The Court reserved the question of whether the efficacy of respondent's plan was not subject to proof as an ordinary fact, but ruled that the evidence upon which the fraud order was issued was not factual but was "solely in the nature of opinion evidence" (R. 73).

The dissenting judge was "not prepared to say that the conclusion of the Postmaster General is patently erroneous, nor that the basis of his conclusion is the type of 'opinion evidence' which was rejected in American School of Magnetic Healing v. McAnnulty, 187 U. S. 94 (1902)" (R. 75).

Even the dissenting judge seemed to have some doubt, however, "whether or not it might have been preferable that the *modus operandi* of appellee [respondent] be tested through some other machinery such as the Federal Trade Commission" (R. 76). He also stated that in view of the holding of the majority of the Court, "I need not express my opinion whether the scope of cross-examination permitted appellee at the administrative hearing was so unduly limited as to warrant remand for a rehearing" (R. 76).

# Argument.

## I

## THE POSTMASTER GENERAL HAS NO POWER TO ISSUE A FRAUD ORDER BASED SOLELY UPON HIS OPINION THAT A MEDICAL REMEDY IS TOTALLY INEFFECTIVE.

### A. American School of Magnetic Healing v. McAnnulty Governs This Case.

This case is governed by **American School of Magnetic Healing v. McAnnulty**, 187 U. S. 94 (1902). Both courts below so held without equivocation, and the bulk of petitioner's brief consists of an effort to establish that that decision is inapplicable. However, an analysis of the opinion of this Court in the **McAnnulty** Case will, we are certain, sustain the view of both courts below as to its effect.

In the **McAnnulty** Case, a fraud order was issued against the company and its principal officers on the ground that they were engaged in a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses. Plaintiffs brought a bill for an injunction against enforcement of the fraud order, in which they averred that their business was (187 U. S. at 96) "founded largely and almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting and remedying thereof," and that the human race possesses the innate power to largely control and remedy its ills and from this source emanates the plaintiffs' treatment.

There were other allegations in the complaint, all of which were admitted by a demurrer filed by the defendant, a local postmaster. However, in reversing the lower court and instructing it to grant a temporary injunction with leave to the defendant to answer, Mr. Justice Peckham

referred only to this one admission, that is, that the plaintiffs' business was founded on certain principles (page 103).

This Court stated that there was no doubt that the mind exerted some influence upon the physical condition of the body and that it was claimed by some that nature could heal without recourse to medicine. The Court admitted that the extent to which these claims could be borne out by actual experience might be a matter of opinion, but that no one could say accurately to what extent mental condition affects the body. Accordingly, the Court held that no one could say it was a fraud for one person to contend that the mind has an effect upon the body greater than **even a vast majority of intelligent people might be willing to admit or believe.** The Court concluded (page 104):

> "* * * **There is no exact standard of absolute truth by which to prove the assertion false and a fraud.** We mean by that to say that the claim of complainants **cannot be the subject of proof as of an ordinary fact**; it cannot be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, **such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity.** We may not believe in the efficacy of the treatment to the extent claimed by complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but matter of opinion in any court. * * *"

The Court went on to give examples of other medical fields in which there were differences of opinion as to the effectiveness of a particular remedy, and at page 105 generalized its view on this subject as follows:

> "* * * **As the effectiveness of almost any particular method of treatment of disease is, to a more or**

> **less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud. * * *"**

And at page 107, the Court stated:

> "It may perhaps be urged that the instances above cited by way of illustration do not fairly represent the case now before us, but the difference is one of degree only. It is a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all it is in each case opinion only, and not existing facts with which these cases deal. * * * **The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved as matter of fact that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood, and, as in our opinion, it is used in these statutes."** [5]

In the second portion of its opinion, this Court demonstrated that the general principle of the inviolability of administrative findings of fact did not apply, because here the Postmaster General had committed an error of law as to his power under the applicable statute.

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5. This view was adopted in determining that representations made by a company in a trademark case were not fraudulent so as to bar the plaintiff from the aid of an equity court in **Moxie Nerve Food Co. of New England v. Holland**, 141 Fed. 202 (C. C. D. R. I. 1905); *cf.* **Hurley v. Dolan**, 297 Fed. 825 (C. C. A. 1st, 1924), where enforcement of fraud order which had been issued against a seller of lucky stones was restrained.

**B. Petitioner's Efforts to Circumvent the Rule of the McAnnulty Case Are Without Foundation.**

The petitioner does not directly attack the rule of the **McAnnulty** decision. Instead, he seeks to circumvent it on three grounds, each of which is completely without foundation. We shall consider them separately.

1. The petitioner points out that the bill in the **McAnnulty** Case included an averment that no fraud, deceit, deception or misrepresentation was ever practised by the plaintiffs, and since such facts were admitted by the Government's demurrer, "that obviously is an adequate basis for setting aside a fraud order in the absence of a record of hearing" (petitioner's brief, page 25).

However, as we have shown, the Court in its opinion does not refer to the allegation of the lack of fraud on the part of the plaintiffs. If it had, and had accepted that allegation as an admitted fact, it certainly would not have gone on for over eight pages to enunciate the important principles, some of which we have quoted above. Obviously, the Court did not proceed upon the theory that the Government by its demurrer had admitted plaintiffs were guilty of no fraud.

2. The petitioner states that this Court in 1902 "assumed" that the effectiveness of treating disease through control of the mind was a matter that could not be proved or disproved as a fact (petitioner's brief, pages 25-26).

If by innuendo the petitioner is implying that in 1949, we have arrived at that Utopia in the development of medical science where the effectiveness of a medical remedy is no longer a matter of doubt on which the opinion of qualified persons may differ, it has certainly not even endeavored to establish that status as a fact. Nor could it be so established.

The newspapers almost daily tell us of medical remedies as to which various schools of thought exist. Indeed, the very subject of discussion in the **McAnnulty** Case is by no means resolved beyond all doubt. The study of psychiatry, hypnosis, and related fields of medical thought are still in a stage of conflict. And who of us has not had qualified physicians differ in their opinions as to the proper remedy for the most common of human ailments?

No, petitioner cannot impute antiquity to the Court's views in the **McAnnulty** Case, and by so doing prove its views wrong. Rather is it true that as medical science progresses, doctors realize how much more doubt exists concerning remedies which in the past were considered infallible. And as to new remedies, it goes without saying that even greater doubt exists, especially in the experimental stages of their development. If medical opinion alone could support a fraud order, the Postmaster General would have had no trouble twenty years ago in justifying such an order against the advocates of the Sister Kenny method of treating those afflicted by infantile paralysis. And even today, he could undoubtedly find "substantial evidence", if opinions alone were considered adequate for this purpose, on which to base a "finding" that that method is ineffective. Even more appropriately could the analogy be extended to divergent views regarding sulfa drugs and penicillin, despite their very wide usage.[6] And even in the case of as common a home remedy as aspirin, recent experiments have indicated a possible effect on the blood-clotting properties of the blood and a dispute of medical opinion has arisen as to the proper use of this universal drug.

The Record in the present case contains a good, though unintended, illustration of the same point. Dr.

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6. After nine years of wide usage, acceptance of sulfathiazole was withdrawn by the American Medical Association because it was found to have caused too many bad reactions. **Time**, October 3, 1949, page 52.

Roberts, one of the Government's two medical witnesses, had expressed some rather positive views regarding iodine and its effect on loss of weight. Then, in connection with an item in respondent's advertising, Dr. Roberts was asked if he knew whether or not the Food and Drug Administration had established a person's normal daily minimum requirement of iodine. He replied, in part (R. II 83):

> "I don't know whether they have set up a statement or an opinion on that. It is a problem of great academic interest. By that I mean **there is a great deal of argument on that point as to the form and amount of iodine which is necessary** under various conditions.* * *"

Thus, from the lips of the Government's own medical expert comes an admission of unsettled difference of opinion regarding a drug which is very old and well known, which is the main ingredient contained in kelp, and which forms the principal basis for the respondent's claim of kelp's efficacy in treating obesity!

And finally, the hearing officer himself stated, in the course of the proceeding, that there might be doctors "* * * who might disagree with a fixed scientific fact" and that even the Government's medical expert would not know "whether **all** doctors might approve or disapprove the treatment" encompassed by respondent's plan (R. II 97).

The Court in the **McAnnulty** Case spoke with a wisdom which has more than withstood the passage of time, when it stated (187 U. S. at 105):

> "* * * As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud. * * *"

It was for the foregoing reason, supported by pointed illustrations, that the Court concluded (page 106):

> "Other instances might be adduced to illustrate the proposition that these statutes were not intended to cover any case of what the **Postmaster General might think to be false opinions**, but only cases of **actual fraud in fact, in regard to which opinion formed no basis.**"

That reasoning is at least as valid today as it was in 1902, and the Government, in endeavoring **by indirection** to argue invalidity by reason of age (and not very old age at that), indicates by its own timidity the insupportability of its argument.

3. Petitioner states that the Court treated the **McAnnulty** Case "as one in which there were two conflicting schools of honest medical opinion, neither of which could be proved false in fact" (petitioner's brief, page 26). At this point, and later in its brief (pages 42-45), petitioner argues that there was in the present case "**no conflict of opinion** on the basic propositions which proved the fraud."

It seems inconceivable that this assertion could be made by anyone who has read the Record in this case. As a matter of fact, to demonstrate that the issuance of a fraud order in this case was based on opinion evidence, and that there was a real difference of opinion, we need hardly look further than the Solicitor's Memorandum to the Postmaster General upon the basis of which the latter issued the fraud order against respondent. In that Memorandum, it is clearly stated that "The findings of fact made herein are based **only** upon the medical testimony of the expert witnesses appearing on behalf of both the Government and the respondent" (R. 25). As we have shown, the pertinent testimony of these medical witnesses consisted of their **opinions** as to the therapeutic value of respondent's treatment.

Although the Solicitor in his Memorandum discussed various phases of the testimony, his ultimate finding in sup-

port of his recommendation for the issuance of a fraud order was "that kelp [the substance sold by respondent as "Kelp-I-Dine"] is valueless in the treatment of obesity" (R. 23), and that although a purchaser is led to believe by respondent's advertising that his product is valuable for the treatment of obesity, "the medical testimony in this case proves that it is valueless for such purpose" (R. 25). The Solicitor, although he paid little attention to the respondent's medical expert, did mention his testimony that kelp, because of its iodine content, was an "antifat for reducing" and "could be used in the treatment of obesity" (R. 23). The Solicitor admitted that the suggested diet forming part of respondent's advertised reducing plan would effectuate a reduction in weight, but stated that the diet was rigid and severe, and that the reduction would not be accomplished without experiencing hunger and the discomforts and strain thereof (R. 23-25).

Finally, the Solicitor stated that one of the expert medical witnesses for the Government conceded on cross-examination that he had seen statements "in medical dictionaries and other books that kelp was at one time used as a treatment for obesity or was reputed to have some value in the treatment thereof" (R. 25-26).

Thus the Solicitor's Memorandum itself,—however grudgingly,—shows that there was a conflict of opinion as to the effectiveness of respondent's remedy. The testimony clearly demonstrates the conflict of opinion. There was no contradiction in any way whatever of the facts that the respondent's remedy was backed by years of study and experimentation, that various doctors had certified to its effectiveness, and that thousands of users had written in to endorse the remedy, many to say that their doctors approved.

And the Record is just as clear that the Postmaster General's ultimate "finding of fact" in support of the issuance of a fraud order, namely, that respondent's remedy

was totally ineffective to accomplish the result for which it was advertised and sold, was merely the **opinion** of the Postmaster General based upon the somewhat divergent **opinions** of the two medical experts appearing for the Post Office Department.

1. Hearing Officer Erred in Excluding Reference to Standard Medical Works in Cross-Examination of Government's Medical Witnesses.

Assuming, *arguendo*, that there was some doubt of the existence in the Record of a conflict of opinion as to the effectiveness of kelp in the treatment of obesity, that doubt would certainly be resolved if consideration were given to the text authorities which respondent sought, in every way he could think of, to introduce into the Record in this case. We have summarized some of the pertinent excerpts from these texts in our Statement at page 6 above. Obviously, they establish at the very least that kelp or fucus (which respondent called "Kelp-I-Dine") has been used and, as late as 1944 (the hearings having been held in January, 1945) was still being used medically in the treatment of obesity.

In refusing to permit respondent's counsel to cross-examine the Government's medical experts by asking them whether they had seen statements in a number of admittedly well-known and commonly used (R. II 104, 109, 110) medical dictionaries and other books, contradicting their testimony, the hearing officer stated that he felt constrained to follow the rule in effect in the state in which he had practised law (R. II 66). Later, he purported to rely on the principle that where the testimony of an expert witness is based **exclusively** on his general knowledge and **not at all** on written authorities, he may not be cross-examined by reference to such authorities. To support his view, the hearing officer stated that the medical expert in question had not relied upon any **specific** treatises or texts (R. II 112).

In the first place, it should be pointed out that, as the hearing officer admittedly knew (R. II 65), the principle of law upon which he based his rulings is highly controverted and that approximately half the jurisdictions in which the question has arisen have ruled that cross-examination from scientific treatises is permissible even though the witness has not stated that he is testifying from his reading of the authorities.[7]

Furthermore, it is doubtful whether it can ever be said that an expert witness,—particularly a medical witness,—is not to some extent relying upon the teaching of others in reaching his conclusions. **Laird v. Boston & M. R. R.**, 80 N. H. 377, 117 Atl. 591 (1922); *cf.* 6 **Wigmore, Evidence** (3d ed., 1940) 5. Consequently, predicating the allowance or refusal of cross-examination upon whether the witness **states** that he is relying upon the authorities harks of a mechanical jurisprudence which this Court should not tolerate. The important fact is that the treatise is not offered as evidence of the truth of the statements contained therein; it is offered merely to contradict the witness.

Accordingly, in view of the general practice in administrative proceedings, relaxing strict rules of evidence to permit the broadest possible inquiry into the question under investigation,[8] the action of the hearing officer in resolving this disputed point against the respondent, and **against the**

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7. *E. g.*, **Yarn v. Ft. Dodge, D. M. & S. R. Co.**, 31 F. (2d) 717 (C. C. A. 8th, 1929), *cert. denied*, 280 U. S. 568 (1929); **Kern v. Pullen**, 138 Ore. 222, 6 P. (2d) 224 (1931). Cases involving this question are collected in a Note, 82 A. L. R. 440, 448 (1933).

8. See **Rep. Att'y Gen. Comm. Ad. Proc.** 70 (1941). See also, section 7(c) of the Administrative Procedure Act of 1946, 60 Stat. 241, 5 U. S. C. Sec. 1006 (c); Sen. Doc. No. 248, 79th Cong. 2d Sess. 320 *et seq.* (1946). Even the regulations of the Post Office Department sanction the adoption of a liberal view. 39 Code Fed. Regs. Sec. 51.16 (Supp. 1946).

**admissibility of helpful, pertinent evidence**, appears unduly harsh,—reflecting a philosophy that the relaxation of strict rules of evidence in administrative proceedings is to be exercised only in favor of the Government.[9]

However, we submit that even if the hearing officer was justified in adopting the stricter of the foregoing divergent views, he was completely in error in relying upon that rule in this case, because here the testimony of one of the medical experts for the Government was admittedly based on textbooks and general medical authorities.

Dr. Norris testified that he had read "every one of them dealing with obesity—all the textbooks" (R. II 98). When pressed to quote or refer specifically to one of the authorities upon which he was relying, Dr. Norris (an employe of the Food and Drug Administration since 1929) stated, "No, I am not stating any definite textbook. **My statements here are made upon my reading of all the textbooks and the recent articles** and a conference with experts and specialists in treatment of obesity * * *" (R. II 103). The witness further testified, "I can negatively say that **I know of no modern reliable book which advocates the use of iodine** * * * as a practical or effective reducing agent or even as an effective adjunct in connection with reducing diets" (R. II 103). The witness then stated that he had seen statements in dictionaries to indicate that seaweed or kelp had been used as a treatment or was reputed to have some value in the treatment of obesity (R. II 104, 111). However, he testified that no reputable textbook took this view (R. II 105).

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9. It seems particularly significant that early in the hearings, when respondent's counsel objected to testimony **of the Government** on the basis of rules of evidence, the hearing officer overruled the objections because of the principle that evidentiary rules are not strictly applied in administrative proceedings (R. II 11, 13-14).

Where, as here, an expert relies, at least in part, upon authorities in the field, it is fully recognized that he may be cross-examined as to the authorities generally, and may be asked if he agrees with extracts from certain books which are read to him. 6 **Wigmore, Evidence** Sec. 1700 (b). The cases are collected in Note, 82 A. L. R. 440, 442 (1933). It is immaterial that the expert revealed for the first time on cross-examination that his opinion was based upon something he had read, rather than exclusively on his personal experience. **Wilcox v. International Harvester Co. of America,** 278 Ill. 465, 116 N. E. 151 (1917).

We submit that even applying strict rules of evidence in an administrative proceeding, as the hearing officer in this case did, under any system of evidentiary law, administrative or judicial, plaintiff should clearly have been permitted to impeach the Government's medical expert, who **admitted** his partial reliance upon written authorities, by referring him to contradictory statements in recognized medical works.

2. Hearing Officer Erred in Excluding Excerpts From Standard Medical Works as Evidence That There Was a Conflict of Opinion as to the Effectiveness of Respondent's Remedy.

Equally erroneous was the hearing officer's refusal to admit these textbooks into evidence as part of respondent's case, both preliminarily (R. II 114), and after the statements had been adopted as the view of respondent's medical witness (R. II 171-173,[10] 175, 181, 182). The statements in

10. At R. II 171, the hearing officer ruled that excerpts from a textbook were admissible after respondent's medical witness approved the views expressed therein. Counsel for petitioner then launched into a lengthy legal argument, citing text authority, in opposition to this ruling. Respondent having been compelled to proceed without counsel despite the fact that the absence of his attorney was due to

the textbooks and dictionaries, as we have shown, unquestionably demonstrated the existence of medical opinion that kelp was effective in treating obesity. Assuming that that opinion was subject to attack, or even could not be supported, the texts proved the **existence** of the opinion. And, for the purpose of establishing the existence of the opinion, the books were admissible, since for this purpose they could in no sense be regarded as hearsay evidence. Even if inadmissible to establish that kelp was effective in treating obesity, they were certainly admissible to establish that the authors of the books were of the opinion, or reflected the opinion, that it was effective in such cases. On this point, there is **no** conflict of authority. **The Philadelphia and Trenton Railroad Co. v. Stimpson**, 14 Pet. *448, 461-462 (U. S. 1840); 6 **Wigmore, Evidence** Sec. 1770 (5).

Even regarding the textbooks and dictionaries as hearsay evidence, there is highly respectable authority for the proposition that they should be admissible for all purposes as an exception to the hearsay rule. Professor Wigmore so stated as far back as 1892, disagreeing with the prevailing rule. **Scientific Books in Evidence**, 26 Am. L. Rev. 390; see also 6 **Wigmore, Evidence** Secs. 1690, 1691. The courts of at least two states appear to follow this enlightened view. **Lambert v. State**, 234 Ala. 155, 174 So. 298 (1937); **Bowman v. Woods**, 1 Greene 441 (Iowa, 1848); *cf.* **Yarn v. Ft. Dodge, D. M. & S. R. Co.**, 31 F. (2d) 717, 721 (C. C. A. 8th, 1929), *cert. denied*, 280 U. S. 568 (1929). In addition, a number of states have adopted the rule of admissibility by statute. See 6 **Wigmore, Evidence** Sec. 1693, for a list of statutes.

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sudden and serious illness (R. II 168), the hearing officer called upon the respondent for authority to support admissibility. Respondent was, of course, unqualified to present legal authority, and the hearing officer then reversed his ruling and rejected the proferred evidence (R. II 173).

And in the American Law Institute's **Model Code of Evidence** (1942), the more liberal rule is unequivocally adopted. Rule 529 provides:

> "A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as an expert in the subject."

The limited amount of comment on this section has all been favorable. See **McCormick, Cases on Evidence** 976 (2d ed., 1948); Long, **The Code of Evidence Formulated by the American Law Institute**, 23 Mich. St. Bar J. 3, 15 (1944) ("sensible and certain").

Certainly a liberal rule of evidence which has been sponsored by eminent legal scholars for adoption even in judicial proceedings, and which has actually been adopted in a number of states, should have been followed in an **administrative** proceeding culminating in such a drastic Governmental action as a postal fraud order. This is especially true in view of the recent trend toward resolving all doubts in favor of the admissibility of evidence. See **Fed. R. Civ. P.**, 43 (a).

Accordingly, we urge that the textbook authorities in question (R. 36-42) either be considered as part of the evidence in this case, or at the very least that the case be returned to the Post Office Department with instructions to conduct a rehearing in which respondent is permitted to use the textbooks both in cross-examining petitioner's medical witnesses and as substantive proof of the existence of conflicting medical opinion as to the efficacy of kelp in obesity cases.[11]

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11. In the event of such a rehearing, respondent, if permitted, could undoubtedly supplement the medical testi-

**C. Petitioner Failed to Adduce Factual Evidence in Support of the Fraud Order.**

Even disregarding the medical works to which we have been referring, there is no doubt in the Record, as we have demonstrated, that the fraud order in this case was issued in reliance solely on opinion evidence, and that there was a clear conflict of opinion as to the efficacy of respondent's remedy.

For these reasons, the Court of Appeals, like the District Court, squarely held that the **McAnnulty** decision governed the disposition of this case. The Court of Appeals stated (R. 73-74):

> "We feel constrained to affirm the judgment of the court below upon the ground that there was no substantial evidence in fact, as distinguished from opinion, to support the findings of the Postmaster General. We would not be understood to say that the value of the plaintiff-appellee's plan and product is not subject to proof as an ordinary fact nor that scientific research and tests may not disclose factually and definitely the efficacy of a particular plan or product. We do say that **the evidence upon which the Postmaster General acted was not factual evidence but solely in the nature of opinion evidence.** If there be ordinary factual evidence of the value of the product and plan here involved it was not placed before the Postmaster General. The proceedings in the Post Office Department do not disclose that any scientific test or research was made with the appellee's product or plan or that the opinions of the medical experts were founded upon the results of any such research or tests. On the contrary, the testi-

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mony on which he was forced to rely by the Government's insistence upon a hasty hearing and refusal to accord respondent adequate opportunity to bring medical witnesses to Washington to a hearing held under wartime conditions, when the shortage of doctors was known to everyone. See *supra* pages 6-7.

mony of the medical experts at the hearing in the Post Office Department seems clearly to have been **founded solely upon professional opinion** based upon a general reading of authoritative textbooks and discussions with other members of the medical profession and indicates that **with respect to the efficacy of appellee's product and plan there are two schools of thought**, albeit one may be outmoded and fallacious in the opinion of a majority of the members of the medical profession."

The Court indicated, in the foregoing excerpt from its opinion, that the Post Office Department **might** have been able to prove **factually** that respondent's remedy was valueless for the treatment of obesity. While it might be argued that this view deviates somewhat from the principles enunciated in the **McAnnulty** Case (R. 74), we need not now determine its validity, for there can be no doubt of the complete absence from the Record in this case of any **factual** evidence of the inefficacy of respondent's remedy.

It was obviously because of this absence of any **factual** evidence supporting the Department's contention, that the Solicitor of the Post Office Department, in his Memorandum for the Postmaster General, based his so-called finding of fact solely upon the opinion testimony of the medical witnesses. For there was no attack at all on the factual, as distinguished from the opinion, aspects of this case. The good faith of respondent, his long and careful study and investigation of the effect of his remedy, his consultation with practising physicians, his receipt of letters certifying his plan from reputable doctors, including the Health Officer of the City of Newark, his receipt of thousands of unsolicited testimonials from users of the remedy, many of whom said their doctors approved,—none of these **facts** was refuted or even challenged.

And respondent has always been open and cooperative even with the Governmental agencies referred to by the petitioner in his brief (page 42) as being in danger of hav-

ing their action crippled because of this case.[12] He has had contact with the Federal Trade Commission, to whom he referred a radio script for approval, and with the Food and Drug Administration, which approved his labeling after he promptly made the small change which that agency suggested.

As a matter of fact, throughout these proceedings, respondent was always willing,—and repeatedly so indicated,—to conform his advertising to the wishes or recommendations of the Post Office Department (R. II 162, 214). Even before the hearings began, respondent through counsel offered to stipulate "to cease and desist from making the representations contained in your memorandum of charges" (R. II 10). But the response of the Post Office Department was that there was no machinery by which the respondent could be advised as to the proper scope of his advertising, and that "those using the mails do so at their own responsibility and if they violate the law then and only then does the Post Office step in" (R. II 216). The only stipulation into which the Government would enter would necessitate the discontinuance of respondent's business and the return to the sender of all mail addressed to respondent's place of business, stamped "Out of Business" (R. II 12).

Thus, so far as **facts** go, respondent's position in this case is unimpeachable. And beyond those facts, the Post Office Department relied for the issuance of a fraud order solely on the **opinion** of its two medical experts as against that of respondent's medical expert and of the conceded statements in various medical dictionaries and texts. If **American School of Magnetic Healing v. McAnnulty** means anything at all, it is certainly authority for the proposition that such action by the Postmaster General is not permitted by the statute.

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12. There is no support whatever in the Record for such an assertion, nor indeed is there even reference to it in the transcript of testimony.

Both courts below considered the primary issue in the case to be respondent's representations as to the effectiveness of his product and plan in the treatment of obesity, and the "finding" of the Post Office Department as to these representations. The courts' approach reflected the emphasis not only of the Solicitor in his Memorandum to the Postmaster General, but also the emphasis of counsel in the arguments before the courts below.

Now, apparently realizing, though not admitting, that the **McAnnulty** Case squarely governs the present case so far as the evidence and finding on effectiveness of respondent's product and plan are concerned, petitioner has attempted to shift his emphasis away from this point and toward minor issues,—issues which up to now have been accorded little attention in this proceeding because everyone realized that they were minor.

Aside from representations as to the loss in weight that would be achieved by using respondent's product in accordance with his plan, there were only a few specific representations in respondent's advertising that were even considered in the Solicitor's Memorandum to the Postmaster General. The Solicitor's remarks as to these representations could not possibly of themselves form the basis for a fraud order, and the Solicitor nowhere indicated that they entered materially into the ultimate finding of fraud.

Among the representations considered by the Solicitor was the statement in a few of respondent's advertisements that followers of his plan would lose excess weight with "no strain" (R. 18), and a statement in a radio script that one could thus lose weight "quickly, easily" (R. 19). The Solicitor referred to testimony in the Record that if a follower of respondent's plan adhered to the recommended diet included with the kelp sent to the user, he would be hungry, since the diet was rigid and severe. From this testimony, the inference seems to be drawn that the representations quoted above were fraudulent.

As the court below indicated, the severity of the diet recommended by respondent was as much a question of opinion as the inherent value of kelp in treating obesity (R. 72). At best, the statement that the loss of weight would be easy is a mildly puffing remark. Plainly, different individuals following the same diet would do so with varying degrees of ease and comfort. Accordingly, the reference to this portion of respondent's advertising could not be taken seriously as the basis for a fraud order.

Again, the Solicitor referred to testimony in the Record that treatments for obesity should be individualized and prescribed only after scientific diagnosis (R. 24), and that although a follower of respondent's plan might lose as much as three pounds per week, it would not be harmless, particularly if the diet were not scientifically indicated in his particular case (R. 25). In this discussion, the Solicitor was apparently referring to the use of the words "absolutely harmless" and "safe" in respondent's advertising (R. 16, 18).

Here again, there is no evidence of a misrepresentation of fact which could possibly form the basis of a fraud order. In the first place, it is perfectly clear, and all the evidence shows, that kelp is harmless (R. II 117), and it is obvious that none of the foods in the recommended diet accompanying the kelp was at all harmful. What the physicians who testified for the Government said was not that respondent's plan was harmful in itself, but that reduction in weight might be harmful to a particular person under certain circumstances, that is, where the person is suffering from heart disease, diabetes, tuberculosis, etc. (R. II 118).

The distinction is a very important one. Obviously, there is virtually no medical remedy sold over the counter, and probably very few foods (although we do not profess to be experts on the subject) that would not harm some persons under certain conditions and in certain quantities. If the fact that an advertised commodity might be harmful

to some persons under certain conditions were a proper basis for the issuance of a fraud order, we submit that as a matter of common knowledge the Court must conclude that fraud orders could be issued against the best known pharmaceutical and food firms in America, solely on the ground that their advertising represented that their products were harmless.

Now, petitioner stresses particularly the "danger" of respondent's plan,—by which, as we have shown, petitioner actually can refer only to the possible danger of weight-reducing as such. While it may be desirable for all people to consult physicians before undertaking a reducing diet,—just as the same might be said of the self-prescribing of aspirin, bicarbonate of soda, and many other common remedies, all of which are undoubtedly harmful to some persons under certain circumstances,—it is a matter of common knowledge that few people take this precaution. We have been called a nation of dieters. Our newspapers and magazines regularly publish various form of diets. Certainly the Post Office Department does not assert that, as a result, the publishers of most of the reputable periodicals in America are guilty of fraud under the postal fraud statutes!

On the other hand, persons suffering from heart disease, diabetes, tuberculosis and similar serious ailments are usually under the care of physicians. It is doubtful that they would enter upon a reducing program without medical advice. In any event, advertisers are certainly entitled to assume that readers exercise a certain modicum of common sense. Ice cream may be advertised as healthful and nutritional, but the advertiser assumes that diabetics will be advised as to its effect upon them.

As petitioner points out in quoting from a decision of this Court (petitioner's brief, page 21), " 'Questions of fraud may be determined in the light of the effect advertisements would most probably produce on **ordinary minds.**' " By that standard, no one could allege that re-

spondent's incidental use in its advertising of words like "harmless" and "safe" meant any more to the ordinary mind than that respondent's plan was harmless and safe unless the user were suffering from some serious ailment. In fact, the words "harmless" and "safe" were **unqualifiedly** true as to kelp, and the understood qualification in the case of seriously ill readers applied only to the reducing diet,—as it would to any of the multitude of such diets published regularly throughout the land.

Accordingly, petitioner's shift of emphasis from the Solicitor's primary finding of ineffectiveness to the Solicitor's passing reference to the use of words like "safe" and "harmless" can avail petitioner nothing.

Certainly no court would sustain a fraud order on so flimsy a basis. In any event, whether or not it might be a laudatory aim of the Post Office Department to bar from the privilege of receiving mail anyone selling a product which under any circumstances might be harmful to any person, obviously the postal fraud statutes do not grant the Postmaster General that authority.

In further efforts to avoid the impact of the **McAnnulty** Case and to upset the clear-cut application of that case by both courts below, the Government goes far afield into metaphysical arguments as to the rules of evidence with which it feels the Court of Appeals has tampered, and makes frenzied protests against what it construes as a requirement by the Court of Appeals that human life be endangered by the conducting of experiments with respondent's plan (petitioner's brief, pages 33-42).

Petitioner's discussion concerning what may be termed the side-effects of the opinion of the Court of Appeals on the admissibility of expert testimony, may be briefly disposed of. Petitioner's point seems to be based on the ruling of the Court of Appeals which affirmed the judgment of the District Court on the ground "that there

was no substantial evidence in fact, as distinguished from opinion, to support the findings of the Postmaster General" (R. 73). The Court went on to make it clear that it was not saying that the value of respondent's product and plan might not be "subject to proof as an ordinary fact", but took the view that "the evidence upon which the Postmaster General acted was not factual evidence but solely in the nature of opinion evidence." (R. 73)

From these statements, petitioner jumps to the conclusion that the Court of Appeals has adopted a rule excluding expert medical testimony from consideration, and that such a rule is erroneous whether or not there is a conflict in the medical testimony (petitioner's brief, pages 33-42).

Actually, this argument of the Government,—which was not advanced in the Court of Appeals,—is at best based on a misapprehension of the meaning of the lower court's ruling. The Court nowhere disputed the evidentiary rules so earnestly espoused by petitioner, and we certainly have no quarrel with the cases and text authorities cited by petitioner at page 34 of his brief,—when placed in their proper context. So far as rules of evidence go, the court below did not even discuss the admissibility of the testimony of the Government's doctors in which they rendered their opinions based on their general experience, knowledge, and reading of authoritative works in the field of science he[illegible]volved. So much for the evidentiary part of petitioner's [illegible]ament. What the Court of Appeals held was that under the postal fraud statutes, the Postmaster General had no power to issue a fraud order based solely on such opinion evidence. If that is not a justifiable conclusion to be drawn from the **McAnnulty** Case, and a proper rule of law, then this Court's opinion in that case just does not mean what it says.

Petitioner

Finally, ~~respondent~~ complains that the opinion of the Court of Appeals would require "specific tests" of re-

spondent's product and plan in order to prove fraud; that "danger to life • • • lurks" in such tests, and that "the American public should not be made experimental animals" by subjecting them to such tests (petitioner's brief, page 35).

Here petitioner's shift of emphasis to the alleged danger of respondent's plan is seen in its most exaggerated and frenzied aspect. We have already demonstrated that the charge of danger was directed **solely** at the reduction in weight which respondent says his plan will accomplish, and not at Kelp-I-Dine or the items of food contained in respondent's suggested diet. We have also shown how little significance was attached by the Post Office Solicitor in his Memorandum, and by the courts below, to respondent's use of words like "safe" and "harmless".

Perhaps the most striking indication of the lack of justification for the Government now to place so much emphasis on this minor phase of respondent's advertising is the complete absence of any proof of harm that has befallen anyone using respondent's product and plan. Respondent at the time of the hearing had been selling his product and plan for some time. He had already received thousands of letters from users, a great many of whom said that their doctors had approved (R. II 152-3). Yet at the hearings, **not one case of harm caused by either Kelp-I-Dine or the recommended diet was presented.** And in the intervening years since the hearing, respondent has continued to market his product and plan. He certainly would not have been permitted to do so by the various Government agencies having jurisdiction in the field of food and drugs, if danger to life lurked in every package and circular, as petitioner would have this Court believe.

However, it should be noted that the Court of Appeals never required the American public to be made "experimental animals". After ruling that "there was no sub-

stantial evidence in fact, as distinguished from opinion, to support the findings of the Postmaster General", the Court went on to state (R. 73):

> "* * * We would not be understood to say that the value of the [respondent's] plan and product is not subject to proof as an **ordinary fact** nor that **scientific research and tests** may not disclose **factually and definitely** the efficacy of a particular plan or product. * * * **If there be ordinary factual evidence** of the value of the product and plan here involved it was not placed before the Postmaster General. The proceedings in the Post Office Department do not disclose that any **scientific test or research** was made * * *."

Obviously in the foregoing portion of its opinion, the Court meant to indicate that in its view of the **McAnnulty** Case, the efficacy or inefficacy of a medical remedy **might** be provable by **factual evidence**. "Research and tests" **might** be one way of accomplishing such proof. The Court was not undertaking to tell the Postmaster General exactly how to make out a case under the postal fraud statutes. Even the terms "scientific research and tests",—and the Court did not restrict the Postmaster General to these forms of proof,—would not compel experimentation on human beings.

And the Court indicated that in a particular case, factual proof of inefficacy might not be possible. As we shall show, that would not, as petitioner argues, "effectively strangle consumer protection by federal administrative agencies" (petitioner's brief, page 34). Other agencies of the Government, having more flexible procedures and invoking less drastic sanctions have, by virtue of these differences, and by virtue of differences in the legislative authority under which they operate, been accorded greater freedom of action in fields of regulation coincident with that of the Post Office Department. Certainly,—entirely apart from the complete absence of even a reference in this Rec-

ord to any such assertion as the Government makes for the first time in this Court,—the cases cited by the Government itself, as we shall demonstrate, show that petitioner's concern is unjustified and that there is no foundation for its cry that the decision of the Court of Appeals "will effectively cripple action not only by the Postmaster General, but also by the Federal Trade Commission and the Food and Drug Administration, against sellers of fraudulent nostrums and remedies" (petitioner's brief, page 42).

In any event, it is clear that the Court of Appeals was not requiring any specific type of factual proof. It merely refused to make new law by permitting the drastic remedy of a fraud order to be applied to a situation where there was no more than the conflicting opinions of doctors based only on general knowledge in a field where opinions differ as to the effectiveness of a medical remedy.

The Government's own medical witness explained how the Court's requirements **could** be met, and gave his implicit approval of those requirements. Dr. Roberts was asked whether he would change his mind about the effectiveness of kelp in treating obesity if "leading physicians [naming some] have stated in treatises that they have used kelp (they call it fucus) in the treatment of obesity * * *" (R. II 67). Dr. Roberts replied (R. II 68):

> "In order to make me change my opinion about the value of using **this or any other drug or method of treatment** I would not only want a statement of another physician no matter how distinguished, but I would want to critically and carefully see the **results of his treatment.**"

These were the words of a witness who admittedly had never prescribed kelp (R. II 64), although he conceded that other doctors might have done so (R. II 67), who had apparently never heard the word "fucus",—the accepted pharmacological synonym for kelp (R. II 66), who had

never tested kelp (R. II 67), who had merely looked up the term "kelp" in an encyclopedia and some textbooks and had not found it, and who had made no other preparation prior to his appearance as an expert (R. II 64),—not even tasting kelp, as did respondent's witness.

And later, Dr. Roberts stated (R. II 69):

> "I don't know of anything that would cause me to change my testimony except, as I said awhile ago, a careful examination of the **scientific experiments which would have to be performed by reputable scientists and physicians under carefully controlled conditions**. I would require information of such experiments and interpretations of those experiments as indicating the value of **this or any other substance** before I would attempt to use the drug as a routine procedure or to recommend its use." (See also R. II 80).

Thus, the Government's witness has clearly gone further than the Court of Appeals in his requirements of proof, and he has imposed these conditions as prerequisites to his changing his own opinion which was based on no tests, no experiments, no study of results of treatment,—but only on general medical knowledge. In effect, he would impose upon respondent the burden of doing what the Government, which **has the burden of proof**, complains is oppressive and dangerous.

In view of all this, can any more weight be attached to petitioner's objections to tests, experiments, and scientific proof than that it is just another of petitioner's frantic but futile efforts to dodge the clear principle of the **McAnnulty** Case, and the sound rule it established?

## II.
## CASES CITED BY GOVERNMENT ARE INAPPLICABLE.

None of the numerous cases cited in petitioner's brief supports the assertion that the rule established in the **McAnnulty** Case does not apply to the present situation.

In its effort to get around the controlling language in the **McAnnulty** decision, the Government has cited approximately forty decisions, the great majority of which involve administrative acts of agencies other than the Post Office Department. Thus, at pages 30 to 33 of its brief, the Government has cited fourteen cases involving judicial review of cease and desist orders issued by the Federal Trade Commission pursuant to Section 5 of the Act of September 26, 1914, 38 Stat. 719, or subsequent amendments thereto, 15 U. S. C. Sec. 45 (1946), and at various other places in its brief the Government has cited four similar cases; in addition the Government has cited eight cases involving enforcement of the federal food and drug laws (pages 22, 31-33).

A mere reading of those cases indicates clearly that the courts have gone much further in sustaining the administrative action of the agencies there involved than they have in cases arising under the mail fraud statutes. The **McAnnulty** Case, for instance, is considered in virtually every fraud order case involving a medical remedy, but it is rarely mentioned in decisions reviewing actions of the Federal Trade Commission or in cases of enforcement of the federal food and drug laws. On a legal basis, all those cases are distinguishable and have no place in the consideration of the present situation because they involve different statutory powers permitting a broader basis for administrative action than do the fraud order statutes under the decision of the **McAnnulty** Case.

**A. Federal Trade Commission Cases Are Inapposite.**

Thus, for instance, Section 5 of the Federal Trade Commission Act originally provided that the Commission could restrain "unfair methods of competition". The amendment of March 21, 1938, 52 Stat. 111, added "unfair or deceptive acts or practices". It takes little argument to demonstrate that the words "unfair or deceptive acts or practices,"—especially in the realm of advertising or labeling in which the cases cited by petitioner fall,—grant the administrator much wider discretion than do the terms "false or fraudulent pretenses, representations, or promises" which form the basis for the exercise of jurisdiction by the Postmaster General under the mail fraud statutes.

Of the many decisions cited by the Government involving Federal Trade Commission orders, passing mention need be made only of the series of **Raladam** cases.[13] These cases were never before cited by the Government at any stage of these proceedings. Now, for the first time, the Government places almost as great reliance upon them as upon **Leach v. Carlile**, which has hitherto been conceded to be the case upon which the Government's position must rise or fall (see below, page 48, *et seq.*).

It is difficult to understand the sudden emphasis placed upon the **Raladam** cases. First of all, they involve orders of the Federal Trade Commission, and therefore have no bearing upon this case. But furthermore, they are so completely distinguishable on their facts and the manner in which they came before the courts as to merit no consideration in this Court's review of the present case.

In the first **Raladam** Case, the Federal Trade Commission forbade the representation that the product in ques-

13. **Raladam Co. v. Federal Trade Commission**, 42 F. (2d) 430 (C. C. A. 6th, 1930), *aff'd sub nom.* **Federal Trade Commission v. Raladam Co.**, 283 U. S. 643 (1931); **Raladam Co. v. Federal Trade Commission**, 123 F. (2d) 34 (C. C. A. 6th, 1941), *rev'd sub nom.* **Federal Trade Commission v. Raladam Company**, 316 U. S. 149 (1942).

tion was a scientific remedy for obesity and forbade advertising of the product as a remedy for obesity unless the statement was added that it was not safe to be taken except under the supervision of a competent physician (42 F. (2d) at 432). The Circuit Court of Appeals reversed the Commission's order on the grounds that whether the remedy in question was "scientific" could not be determined as a matter of fact, and secondly, that the Commission's conclusion that the product was unsafe was based only on the possibility of danger to the exceptional user suffering from certain diseases. The Court pointed out that all that the testimony of the Government's witnesses really meant was that they believed that "no active drug or agent should be by the public self-prescribed or self-administered." The Court went on to state that the same conclusion was "inevitable as to numerous so-called standard remedies sold over the counter to anyone who wants them; not one of them is, according to the standard of safety thus advocated, safe for popular use and consumption" (42 F. (2d) at 434). The Court held that the **McAnnulty** Case and **Leach v. Carlile** were totally inapplicable since they involved a question of fraud not present in a Federal Trade Commission case (42 F. (2d) at 435). Finally, the Court held that the Federal Trade Commission had no jurisdiction.

The Supreme Court granted certiorari, limited to the question of the jurisdiction of the Federal Trade Commission (282 U. S. 829).

In the course of its opinion, this Court stated that the Commission's power to issue a cease and desist order depends upon the existence of three prerequisites: (1) that the methods complained of are unfair; (2) that they are methods of competition in interstate commerce; and (3) that the proceeding by the Commission is in the public interest. The Court then stated (283 U. S. at 647):

> "* * * We **assume** the existence of the **first** and third of these requisites; and pass at once to a consideration of the second."

This Court ultimately resolved the jurisdictional question against the Commission, and affirmed the court below.

Some time later the Commission filed an amended complaint charging the company with violations of the Act subsequent to the date of the first cease and desist order, and a second order was issued against certain representations in the company's advertising.

In its second opinion, the Circuit Court of Appeals, in rejecting the company's contention that the issues were *res judicata*, made it clear that the Supreme Court in its first decision had decided only the jurisdictional question and had not ruled upon the lower court's holding that the safe and scientific nature of the product was a matter of opinion rather than fact (123 F. (2d) at 36). The Circuit Court of Appeals then set aside the Commission's order on jurisdictional grounds. This Court reversed, on the ground that the Federal Trade Commission had jurisdiction. At the conclusion of this Court's opinion (316 U. S. at 152-153), the company's contention that the issues were *res judicata* was briefly discussed and held to be without merit, and the Court pointed out that the company "has not sought in this Court to sustain the judgment of the court below on any other ground." (page 153)

Accordingly, aside from the first decision of the Circuit Court of Appeals, which, if anything, supports our position in this case, the **Raladam** cases stand for nothing except the enunciation of principles as to the jurisdiction of the Federal Trade Commission. Obviously, that has nothing to do with the present case.

### B. Cases Involving Federal Food and Drug Laws Are Not Pertinent.

The federal food and drug laws are even more strikingly different from the postal fraud statutes, especially since they have been changed from time to time to reflect changing congressional intent in the light of court decisions,

whereas the postal fraud statutes here involved have not been changed in any respect material to the present case since their passage in 1872.

A review of certain provisions of the food and drug laws, some of the amendments thereto, and a few of the decisions thereunder clearly demonstrates this difference. Section 8 of the Act of June 30, 1906, 34 Stat. 771, provided, *inter alia*, that the term "misbranding" should apply to all drugs or articles of food, the package or label of which bears any statement regarding such article, or the ingredients or substances contained therein, "which shall be false or misleading in any particular", and then went on to provide that a drug should be deemed to be misbranded if it was an imitation of another article or if the package failed to bear a statement of the quantity or proportion of certain named ingredients.

In **United States v. Johnson**, 221 U. S. 488 (1911), this Court held that the foregoing provisions were aimed, not at all false or misleading statements in connection with drugs, but only at such as determine the identity of the drug, possibly including its strength, quality and purity. Accordingly, statements as to the effectiveness of a remedy to cure cancer were held not within the proscription of the Act.

In 1912, the Act was amended (Act of Aug. 23, 1912, 37 Stat. 416), to add as a ground for finding that a drug was misbranded the condition that "its package or label shall bear or contain any statement * * * regarding the curative or therapeutic effect of such article * * * which is false and fraudulent."

It might be argued that cases arising under the 1912 amendment have some pertinence here because, as in postal fraud cases, fraud was an essential element of proof on the part of the Government. However, the three cases cited by the Government which arose under the 1912 amendment are completely distinguishable and can have no bearing on the present case.

**Simpson v. United States**, 241 Fed. 841 (C. C. A. 6th, 1917), cited at page 31 of petitioner's brief, was a criminal case. The defendant, a graduate physician, represented, *inter alia*, that his product was valuable for the treatment of all nervous diseases, diseases of the brain, spinal cord, and medulla oblongata, and heart troubles. The Court found that there was adequate evidence from which the jury could find "that he **knew** the falsity of the broad claim made for his compound" (page 845).

Similarly, in **United States v. Dr. David Roberts Veterinary Co., Inc., et al.**, 104 F. (2d) 785 (C. C. A. 7th, 1939), a criminal case under the same Act, the individual defendant, a doctor, admitted that his animal medicines could not accomplish all that he had claimed (page 788), and the Court again stated that it was a justifiable inference from the evidence "that the defendants **knew** the articles did not possess the curative or therapeutic qualities claimed for them" (page 789).

Obviously the pertinent comments of the courts in these two cases, which we have quoted, can have no application to the present case where there has never been any question of the respondent's good faith, nor any averment or finding to the contrary.

Finally, in **Goodwin, et al. v. United States**, 2 F. (2d) 200 (C. C. A. 6th, 1924), so far as the opinion of the Court reveals, the issue was primarily one of jurisdiction and there was no question of conflicting medical opinion involved.

Thus none of the cases cited by the Government under the Food and Drug Act of 1906, as amended in 1912, when fraud was a necessary element of proof, is at all controlling or even applicable here.

Subsequently, in the new Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040 (1938), as amended, 21 U. S. C. Secs. 301 *et seq.* (1946), it has been provided clearly and

unequivocally that a drug or device shall be deemed to be misbranded, *inter alia*, "if its labeling is false or misleading in any particular". There follow many additional instances in which misbranding may be found to exist. Thus the coverage of the Act has been materially extended. See **Research Laboratories, Inc. v. United States**, 167 F. (2d) 410, 420 (C. C. A. 9th, 1948).[14] It is now similar in scope to the Federal Trade Commission Act. Accordingly, the remaining five Pure Food and Drug cases cited by the Government at pages 22, 32 and 33 of its brief are distinguishable for the same reason as the Federal Trade Commission cases already discussed in the preceding section of this brief.

We could distinguish on their facts many more of the decisions cited by the Government involving other agencies,

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14. Even under the broadened provisions of the Federal Food, Drug and Cosmetic Act, in cases involving misbranding or mislabeling of drugs, the Government in many cases in recent years has actually made elaborate and comprehensive tests of the remedies in question, both in the laboratory and under field conditions. See, *e. g.*, **United States v. 7 Jugs, Etc., of Dr. Salsbury's Rakos**, 53 F. Supp. 746 (D. Minn. 1944), cited at pages 32 and 33 of petitioner's brief. In this case, the Court said, at page 758, "Under the law as it now exists, before a court is warranted in submitting the false or misleading qualities of an assertion of effectiveness to a jury to decide, it must be satisfied that something more is involved than mere differences of opinion between schools or practitioners." See also **Research Laboratories, Inc. v. United States**, 167 F. (2d) 410 (C. C. A. 9th, 1948), page 32 of petitioner's brief. In the latter case, the Court, at page 414, called specific attention to the difference between the meager technical facilities for the determination of medical questions possessed by the Postmaster General and the almost unlimited professional resources available to the agency which carries on investigations in the enforcement of the Federal Food, Drug, and Cosmetic Act.

and could cite other decisions involving those agencies which on their facts directly support our position in this case. See, *e. g.*, **Carlay Co. et al. v. Federal Trade Commission,** 153 F. (2d) 493 (C. C. A. 7th, 1946) (a weight-reducing remedy). However, in view of the differences we have pointed out in the statutes under which those agencies operate as compared with the postal fraud statutes, no purpose would be accomplished by this procedure,—except unduly to extend the length of this brief.

In a larger sense, however, the reason for the difference in the approach of the courts to the Federal Trade Commission cases and also to the food and drug cases, as contrasted with the postal fraud cases, lies in the difference in the permissible sanctions or remedies available to the respective administrative agencies. Under the Federal Trade Commission Act, the Commission may issue a cease and desist order against a method, an act, or a practice. Thus, if a person advertises his product in a manner deemed by the Federal Trade Commission to be unfair or deceptive, the Commission will order him to cease advertising in that manner. Normally, the order will refer specifically to certain words or phrases in the advertisement which the advertiser is required to excise. If the court of appeals, under the statutory review procedure provided in the Act, enforces the order of the Commission, the offender is rarely, if ever, put out of business. He need only conform his advertising with the order, and he is then free to continue to transact business.

Thus, for example, the Government has placed some emphasis on **Irwin et al. v. Federal Trade Commission,** 143 F. (2d) 316 (C. C. A. 8th, 1944), in view of the "most extreme claims" which the manufacturers of the device there involved made for their product (petitioner's brief, p. 40, n. 15). There is no doubt that the manufacturers in that case went extremely far in their claims as to the therapeutic value of their device. Yet the Court, after emphasizing the sincerity of the manufacturers in their beliefs, stated

that an injunctive order preventing the sale of the device in question or restricting its use would have been unjustified. The Court stressed the fact that the Commission did not attempt to prevent the sale of the device or restrict its use for the purpose for which it was designed, but merely ordered the elimination of certain representations which were included in the advertising of the device (143 F. (2d) at 323).

Similarly, in cases arising under the food and drug laws, the administrator normally proceeds by libel in a federal court to seize the offending product or device, or by criminal action against the purveyors of the product or device. There the court action is the primary action and not merely a review of an administrative decision. Accordingly, the defendant is protected by the general rule requiring a decision on the **preponderance of the evidence**, —or, in a criminal case, **proof beyond a reasonable doubt**,— and also by his right to a trial by jury.

In the fraud order cases, however, not only is the order issued upon the authority of a single administrative official, and upon the recommendation of a subordinate in his department, but, more importantly, the order, if enforced, necessarily puts the offender out of business. It is difficult to conceive of a modern business that could exist without the use of the mails. Even if it could, it would have little good will left when its regular mail customers or correspondents of any kind received from the Post Office the letters which they had addressed to that business with the word "**Fraudulent**" emblazoned on the envelope.

### C. Postal Fraud Cases Cited by Government Fail to Establish That Present Case Is Not Governed by McAnnulty Case.

We now consider the cases cited by petitioner involving fraud orders issued by the Postmaster General. Although the Government has succeeded in gathering together a con-

siderable number of decisions, a mere reading of them demonstrates that they are impressive only in their number and not in the applicability of the principles enunciated in them. We shall as briefly as possible point out how each of those cases is distinguishable from the present case and from the **McAnnulty** Case.

Thus, in one group of cases, there was no basis in the record for the Court to find any difference of opinion as to the effectiveness of the particular remedy in question. **Cable, et al. v. Walker**, 152 F. (2d) 23 (App. D. C., 1945), petitioner's brief, pages 19 and 31; **Fanning v. Williams, et al.**, 173 F. (2d) 95 (C. A. 9th, 1949), petitioner's brief, pages 23, 32 and 39.[15]

Another group of cases cited by the Government are undeniably cases in which, **by standards of an exact science**, the representations made by the offender were clearly false and fraudulent. Thus, in **Elliott Works, Inc., et al. v. Frisk**, 58 F. (2d) 820 (S. D. Iowa, 1932), cited at page 19 of the petitioner's brief, the plaintiff represented that his device charged batteries instantly. The Government proved **by tests conducted by the United States Bureau of Standards**, following directions supplied by the plaintiff, that his device not only did not charge batteries instantly, but **did not charge batteries at all.** Thus, on the basis of **scientific facts ascertainable by pragmatic tests**, the representations contained in the plaintiff's advertising were proved **false and fraudulent as a matter of fact.** In distinguishing the **Mc-**

15. In **Fanning v. Williams**, the Court itself distinguished the decision of the Court of Appeals in the present case, stating (173 F. (2d) 95, 97): "* * * In that case, however, there developed at the hearing a conflict of medical testimony as to the therapeutic value of the product in question. It was apparent that there were two schools of thought among the medical profession and no consensus has as yet crystallized. We have no such situation here. * * *"

**Annulty** Case, while recognizing its authority, the Court pointed out that "the finding of the solicitor in this case is not based on opinions, but upon a scientific investigation, findings, and tests made by the United States Bureau of Standards" (page 825).

Similarly, in **Farley v. Heininger, et al.**, 105 F. (2d) 79 (App. D. C. 1939), cited in petitioner's brief at pages 18 and 30, plaintiff advertised that he could fit people needing false teeth by wax impressions made by them at home, and that the teeth would fit well, improve the appearance of the wearer, etc. An investigator for the Government who had actually visited fifty customers of the plaintiff, testified that **not one** had received properly fitting and functioning teeth. Test sets of teeth ordered by Government agents were examined at the hearing, and it was apparent to the naked eye that they did not fit (page 82). Accordingly, the Court had before it representations as to physical facts and testimony proving the falsity of those representations as an undeniable fact. As the Court pointed out at page 84, unlike the representations in the **McAnnulty** Case, those here were "easily susceptible of demonstration and of proof".

In **Farley v. Simmons**, 99 F. (2d) 343 (App. D. C. 1938), cited in the petitioner's brief at page 18, the plaintiff advertised booklets and books in a manner calculated to create the impression in the reader's mind that he would get "sexy" reading material. Actually, there was no dispute that the material received by the buyer was of a non-salacious and non-obscene nature. As the Court pointed out at page 346, this case bore no similarity to the **McAnnulty** Case because the representations and promises in the **Simmons** Case did not lie in any field of scientific or pseudoscientific knowledge, and once it was established that the plaintiff represented his material to be of a salacious nature, there was no question, as a clearly-established fact, that the representation was untrue.

Similarly, **Putnam v. Morgan**, 172 Fed. 450 (S. D. N. Y. 1909), cited at page 19 of petitioner's brief, has no application to the present case. There the plaintiff advertised that for ten cents she would furnish a cake of soap and give away a new safety razor outfit free to any such purchaser of soap. The questions were, first, whether this was fraudulent in view of the fact that she regularly sold the soap for two cents and, second, whether the representation as to the safety razor **outfit** was false since she sent the purchaser only a safety razor. Obviously, there was no room in that case for a conflict of **medical** opinion such as exists in the present case and existed in the **McAnnulty** Case.

Next, in **Branaman v. Harris**, 189 Fed. 461 (W. D. Mo. 1911), cited in petitioner's brief at pages 19 and 33, the plaintiff advertised a cure for deafness. He purported to specify certain symptoms which would indicate a type of deafness incurable even by his remedy, and represented that if replies from prospective patients indicated the presence of these symptoms, he would not accept those cases. The Government sent thirteen test letters, each of which clearly contained reference to these symptoms of incurable deafness, and the plaintiff nevertheless diagnosed each case as one in which his remedy would effectuate a cure. Obviously, the fraud in this case consisted of the plaintiff's willfully erroneous diagnoses (page 472), which constituted clear fraud with respect to his representation that he would not undertake to accept such incurable cases. The Court pointed out that the charges preferred by the Post Office Department did not involve solely matters of opinion, since in the Memorandum submitted to the Postmaster General, it was clearly stated that the department **did not undertake to decide the scientific question of the purported use of electricity for deafness** (page 467). Thus, there is no similarity to the present case in which the Government's principal finding, expressly based upon the medical opinion alone, was that plaintiff's remedy is totally ineffective in the treatment of obesity.

**Aycock v. O'Brien**, 28 F. (2d) 817 (C. C. A. 9th, 1928), cited in the petitioner's brief at page 19, involved a fraud order issued against the promoter of medicinal remedies for tuberculosis and other maladies. The plaintiff refused to testify as to the constituents of his remedies. He compared himself to Jesus Christ in that he did not know how his remedies effected results but only knew that they did effect results. The Court found that there was sufficient evidence to impeach the plaintiff's moral integrity in asserting his good faith and **his own belief in the efficacy of his remedies**. The plaintiff himself admitted that he once believed his medicine was a specific for tuberculosis of the lungs, but **did not so believe any more**. Accordingly, the plaintiff himself could be found not to believe the representations which he made, so that there was no room for dispute as to the effectiveness of his remedy. **His own mental state was fraudulent as a matter of fact**. There is no such contention in the instant case.

Three other postal fraud cases cited by the plaintiff require only passing comment. **Donaldson v. Read Magazine, Inc., et al.**, 333 U. S. 178 (1948), cited in petitioner's brief at pages 18 and 20, involved representations made by a magazine in the advertisement of a puzzle contest. It had nothing to do with a medical remedy or any other scientific subject. **Pike et al. v. Walker**, 121 F. (2d) 37 (App. D. C. 1941), and **Summers v. McCoy**, 163 F. (2d) 1021 (C. C. A. 6th, 1947), cited at page 31 of petitioner's brief, were included by the Government in long lists of citations, but obviously were not strongly relied upon for the reason that in neither case were any of the facts stated by the Court, nor were the principles here involved even mentioned.

### 1. Leach v. Carlile Distinguished.

We come then to the decision upon which the Government principally relied in the courts below, and to which it accords paramount weight in its brief filed with this Court.

The Government contends that the ultimate error committed by the courts below was that they disregarded and failed to follow **Leach v. Carlile**, 258 U. S. 138 (1922). The Government's contention is that **Leach v. Carlile** and not the **McAnnulty** Case governs the present situation. This is really the legal question to be decided by this Court.

The courts below flatly discarded this contention (R. 61 and 72), and we submit that in applying the principles of the **McAnnulty** Case rather than the decision in **Leach v. Carlile**, the courts were clearly correct.

For a proper understanding of **Leach v. Carlile**, it is necessary to consider first the opinion in the Circuit Court of Appeals for the Seventh Circuit [267 Fed. 61 (1920)], since the facts and the reasoning leading to the decision by the Supreme Court of the United States are there more fully set forth.

Plaintiff advertised a remedy for sexual weaknesses and disorders in men. A fraud order was issued against him and he sought to enjoin its enforcement. The Circuit Court of Appeals pointed out that much evidence was adduced and many authorities cited both ways as to the effectiveness of the type of remedy advertised by the plaintiff, and concluded that there was a real difference of opinion on this question (page 63).

The Court unequivocally recognized that the **McAnnulty** decision required the issuance of an injunction against enforcement of a fraud order based solely upon a finding of total ineffectiveness of a medical remedy, as to the effectiveness of which there was a difference of opinion. In this regard, the Court stated (pages 63-64):

> "It was not the design of these statutes to vest the Postmaster General with authority to determine between contradictory views held in apparent good faith upon a subject the merits or demerits of which may fairly be said to be a matter of opinion among those who ought to know. American School of Mag-

> netic Healing v. McAnnulty * * *. It would follow that, if the order herein is sustainable only upon the inefficacy and absolute want of remedial virtue of the substance which appellant sells, the injunction should have issued."

However, the Court stated that "any so-called remedy, however meritorious, may in its exploitation become a subject-matter of fraud". Here the advertisement in question contained such grossly extravagant and unwarrantedly optimistic representations, in a letter and a twenty-page booklet, that the findings of the Postmaster General that those representations were fraudulent had to be sustained. Thus, the plaintiff represented, among other things, that his remedy was being recommended and prescribed by leading physicians throughout the civilized world for nervous weakness, general debility, sexual decline, weakened manhood, urinary disorders, lame back, lack of ambition, energy, sleeplessness and rundown system; that the ingredients could be obtained only in plaintiff's product; that the remedy was compounded in one of the largest and best laboratories in the world, etc.

With regard to these and similar assertions, the Court stated (page 67):

> **"The record does not warrant the conclusion that even appellant believed such broad assertions,** nor that he was a physician or a scientist, or had conducted experiments or investigations; and **it does not appear that he had basis for any belief whatever on the subject. * * *"**

Accordingly, we have in the cited case representations which were obviously false and which the administrator could find even the plaintiff did not believe. It was on this ground that the Circuit Court of Appeals affirmed the decree of the District Court denying an injunction against enforcement of the fraud order.

The good faith of plaintiff in the present case was not questioned in any respect whatever,—as indeed it could not have been.

In the Supreme Court of the United States, the distinction between **Leach v. Carlile** and the **McAnnulty** Case was clearly set forth by Mr. Justice Clarke as follows (258 U. S. at 139):

> "• • • In argument it is contended that the question decided by the Postmaster General was that the **substance** which the appellant was selling did not produce the results claimed for it, that this, on the record, was a matter of opinion as to which there was conflict of evidence, and that therefore the case is within the scope of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. Without considering whether such a state of facts would bring the case within the decision cited, it is sufficient to say that **the question really decided by the lower courts was, not that the substance which appellant was selling was entirely worthless as a medicine, as to which there was some conflict in the evidence, but that it was so far from being the panacea which he was advertising it through the mails to be, that by so advertising it he was perpetrating a fraud upon the public.** This was a question of fact which the statutes cited committed to the decision of the Postmaster General • • •".

In the present case, the Postmaster General has himself taken the case out of the rule set forth in **Leach v. Carlile** and placed it within the principles of the **McAnnulty** Case by the finding upon which the fraud order was **primarily** based, namely, that respondent's remedy was **totally ineffective and valueless in the treatment of obesity**. The Circuit Court of Appeals in **Leach v. Carlile**, clearly recognized that if that was the ground of the fraud order, the **McAnnulty** Case would have compelled the issuance of an

injunction against its enforcement. And it was clearly unnecessary for the Supreme Court of the United States, in affirming the Circuit Court of Appeals, to express an opinion on this point because that was plainly **not** the ground upon which the fraud order was issued.[16]

The Court of Appeals in the present case (R. 71-72), gave full consideration to **Leach v. Carlile** and distinguished it on the grounds set forth above. The Court stated that,—unlike **Leach v. Carlile**,—in the present case, "The record is entirely barren of any charge by the Government that the 'Kelp-I-Dine' advertisements raised hopes of a cure-all panacea" (R. 72). Furthermore, said the Court (R. 72):

> "* * * There is no indication in the record at all, that the Government intended to make any such charge and there is no substantial evidence to support such a finding. The basis for the 'fraud order' was that kelp is valueless for the treatment of obesity while the advertisements lead one to believe that it is valuable for such purpose. The Postmaster General allegedly

16. **Missouri Drug Co. v. Wyman**, 129 Fed. 623 (E. D. Mo. 1904), cited at page 19 of petitioner's brief, was decided by the same district court which was reversed in the **McAnnulty** Case. The facts and the decision are strikingly similar to those in **Leach v. Carlile.** Here plaintiff advertised that his remedy was the only known cure for lost manhood and the only known specific that would cure lost manhood in all its forms and conditions; that there was no other cure in the world that would do this; that plaintiff was "one of the largest chemistries" in the United States; that there was no case that plaintiff's remedy would not cure permanently; that all physicians knew the reputation of plaintiff and knew that when plaintiff sponsored a remedy, the remedy must be as represented. The Court found that, **aside from any question of opinion as to the effectiveness of the remedy**, the Postmaster General had the power to find these statements false and to base his fraud order upon such findings.

found as an ordinary fact that kelp has no value for the specified purpose, but there is nothing to indicate that he found the advertisements asserting cure-all results." [17]

The Record in this case fully demonstrates, as we have shown, the inapplicability of **Leach v. Carlile** and the correctness of the court below in considering the **McAnnulty** decision as binding.

We have already pointed out (pages 27 to 30 of this brief) that there were only a few minor representations in respondent's advertising that were even considered in the Solicitor's Memorandum to the Postmaster General. These involved the ease and safety of following respondent's plan. We have demonstrated that the Solicitor's remarks as to these items in respondent's advertising could not possibly of themselves support a fraud order, and the Solicitor nowhere indicated that they were material in leading him to his ultimate finding of fraud. That finding was based on the Solicitor's opinion that respondent's product, as distinguished from the suggested diet which was part of his reducing plan, was valueless in the treatment of obesity.

Thus we return once more to **American School of Magnetic Healing v. McAnnulty**. All of petitioner's efforts in both courts below to get around the effect of that decision

17. Respondent's advertising included a guarantee that "if you find Kelp-I-Dine does not help you lose weight, return the remainder to us and we will refund your money in full" (R. 16). This was plainly an implicit reservation that respondent's plan possibly did not work in all cases and might not be universally beneficial in the treatment of obesity. Such a money-back guarantee has been a factor in distinguishing **Leach v. Carlile**, and in affirming the issuance of an injunction against the enforcement of a fraud order in a case involving a medical remedy. **Jarvis v. Shackelton Inhaler Co.**, 136 F. (2d) 116 (C. C. A. 6th, 1943), cited at page 19 of petitioner's brief.

have been of no avail. We have shown why. The **McAnnulty** decision clearly covers the facts of the present case, and no other decision cited by petitioner here or below does so. The principle of the **McAnnulty** decision, as applied by the Court of Appeals, is a salutary restriction upon the unparalleled administrative power which the Postmaster General has sought to exercise in this case.

And it is perfectly apparent that petitioner's fear that adoption of the principles of the **McAnnulty** Case here will "effectively cripple action" by the Federal Trade Commission and the Food and Drug Adminstration in the field of medical remedies is groundless. It is obvious, from a mere reading of a few of the Federal Trade Commission and Food and Drug Administration decisions in the field of medical remedies, that those agencies have not been and will not be retarded in their enforcement programs by the **McAnnulty** Case or by the decision of the Court of Appeals in this case. If the Postmaster General is retarded by either decision, it is only in a field which he has been forbidden to occupy since 1902, with the apparent sanction of the Congress, which, while broadening the scope of the enforcement powers of governmental agencies under other statutes encompassing fraudulent or misleading medical remedies, has done nothing since 1872 to widen the scope of the mail fraud statutes.

## CONCLUSION.

The fraud order in this case would unquestionably put the respondent out of the business in which he has been engaged for many years. Clearly, he could not survive without resort to mail service,—the "highway over which all business must travel". **Esquire, Inc. v. Walker**, 151 F. (2d) 49, 51 (App. D. C. 1945), *aff'd sub nom.* **Hannegan v. Esquire, Inc.**, 327 U. S. 146 (1946).

In **American School of Magnetic Healing v. McAnnulty**, the Supreme Court enunciated the clear principle that

where, as here, the basis for a fraud order is an administrative finding of total ineffectiveness of a medical remedy as to which there is a conflict of opinion, the Postmaster General has exceeded his statutory powers. At its worst, the instant case is plainly not one so shocking in the elements of fraud and danger to the public welfare as to call for a departure from the clear meaning of the **McAnnulty** decision.

In the **Esquire** Case, the Supreme Court denied to the Postmaster General the right to exclude a magazine from the second-class mail privilege on the basis of his opinion that the magazine did not contribute to the public good or welfare. While that case did not arise under the statutory provisions here involved, the opinions of both the Court of Appeals for the District of Columbia (151 F. (2d) at 54) and of the Supreme Court (327 U. S. at 157) indicate a resurgent tendency to limit the tremendous power of the Postmaster General, at least where the exercise of that power is based solely on his opinion in a controversial field.

In his opinion for the lower court in the **Esquire** Case, Justice Arnold, perhaps somewhat facetiously, suggested that the Post Office officials be limited "to the more prosaic function of seeing to it that 'neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds'" (151 F. (2d) at 55). We shall not presume to venture that far. We here urge only that the exercise of the Postmaster General's power be restricted to cases where it can be pragmatically ascertained as a fact, and not merely on the basis of an administrative choice between conflicting opinions, that there is present a "scheme or device for obtaining money • • • through the mails by means of false or fraudulent pretenses, representations, or promises". Rev. Stat. Sec. 3929, as amended, 39 U. S. C. Sec. 259 (1946).

For the foregoing reasons, we respectfully urge the Court to affirm the decision of the court below.

At the very least, the Postmaster General should be instructed to rehear this case, and to permit respondent to cross-examine the Government's medical experts by reference to written authorities in the field, as well as to introduce such recognized text authorities as substantive proof of the existence of conflicting medical opinion as to the efficacy of kelp in obesity cases, and to introduce such rebuttal medical testimony as may then appear appropriate.

Respectfully submitted,

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# Appendix.

## REVISED STATUTES § 3929, AS AMENDED, 39 U. S. C. § 259 (1946).

The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by mail to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

## REVISED STATUTES § 4041, AS AMENDED, 39 U. S. C. § 732 (1946).

The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders.

This shall not authorize any person to open any letter not addressed to himself.

The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by means of postal money orders to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way.